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No. 97-1009

In The

Supreme Court of the United States

October Term, 1997

JOHN KNOX WALKUP, Attorney General of the State of Tennessee, *et al.*,

Petitioners,

vs.

BOARD OF COUNTY COMMISSIONERS OF SHELBY COUNTY, TENNESSEE, *et al.*,

Respondents,

SHELBY COUNTY BOARD OF EDUCATION, *et al.*,

Intervenor Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION FOR INTERVENOR RESPONDENTS SHELBY COUNTY BOARD OF EDUCATION, *et al.*

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QUESTIONS PRESENTED FOR REVIEW

Whether the Sixth Circuit Court of Appeals erred in holding that the election provisions of Tennessee's Education Improvement Act ("EIA"), as applied in Shelby County, Tennessee, violate the rights of voters in the Shelby County School District under the Fourteenth Amendment to the United States Constitution by allowing out-of-district voters with no substantial interest to vote in county school board elections under circumstances in which the votes of the out-of-district voters not only dilute, but would overwhelm the votes of voters residing in the district.

STATUTORY PROVISION INVOLVED

In addition to Tennessee Code Annotated § 49-2-201(a)(1) cited by Petitioner, Tennessee Code Annotated § 49-2-201(c) provides that:

> (c) Only persons who are residents of the area served by a local education agency are eligible to serve on the school board in counties with populations of seven hundred thousand (700,000) or more, according to the 1990 Federal Census, or any subsequent Federal Census.

STATEMENT OF THE CASE

For a comprehensive statement of the relevant facts, this Respondent refers to and incorporates hereby by reference the Statement of the Case contained in the Response in Opposition to Petition for Writ of Certiorari filed by the Board of County Commissioners of Shelby County, Tennessee, as supplemented by the Statement of the Case contained in the Response in Opposition to Petition for Writ of Certiorari filed by Intervenor Respondents, Herman Cox, *et al.*

REASONS FOR DENYING THE WRIT

In the section of Petitioner's Petition for Writ of Certiorari entitled "Statutory Provision Involved," Petitioner cites Tennessee Code Annotated § 49-2-201(a)(1). Petitioner completely omits from its petition any reference to or discussion of Tennessee Code Annotated § 49-2-201(c). This provision, passed by the Tennessee Legislature in 1992, makes a specific reference to a "geopolitical entity" in Tennessee counties having a population of 700,000 or more (Shelby County). This geopolitical entity is the "area served by a local education agency."

The constitutionality of T.C.A. § 49-2-201(c) was addressed and upheld by the Tennessee Court of Appeals in 1996. *County of Shelby v. McWherter*, 936 S.W. 2d 923 (Tenn. App. 1996). Application for Permission to Appeal was denied by the Tennessee Supreme Court on October 28, 1996. The passage of Tennessee Code Annotated § 49-2-201(c) is significant for two reasons. First, the Tennessee State Legislature created, by statute, a specific geopolitical entity having definitive geographical boundaries within which members of the board of that "local education agency" must preside. Second, the Tennessee State Legislature clarifies that the geographical area wherein children who attend Shelby County schools reside is the geopolitical entity which "is served" by the Shelby County School Board.

The entire argument of Petitioner in its Petition for Writ of Certiorari is based upon the erroneous premise that Respondents seek to disenfranchise certain citizens residing within a geopolitical entity. Rather, Respondents, in a manner consistent with every case in every circuit yet to examine this question, seek merely to allow residents of the area served by the Shelby County School System to elect the members of the Shelby County School Board. Likewise, those residents of the City of Memphis would continue to elect the membership of the Memphis City School Board.

The concept of citizens of a given school district electing the membership of its board of education, in addition to being consistent with all other federal case authority, is consistent with and supportive of the educational reforms enacted by the State of Tennessee. In *Tennessee Small School Systems v. McWherter*, 894 S.W. 2d 734 (Tenn. 1995), the Tennessee Supreme Court states:

The significant provisions of the BET other than

> funding are characterized as governance and accountability measures. These reforms are designed to address "the relative indifference" to education demonstrated by some local systems, which this court found to be a contributing factor to the inequities in educational opportunities . . . The BET purports to accomplish these objectives by granting to local officials more discretion in the management of the system and holding those officials accountable for obtaining measurable accomplishments in providing an effective educational system. At pp. 736, 737.

The goals of the state legislators and educators of bringing about enhanced local accountability and eliminating relative indifference to education would be substantially frustrated if the plan sought to be implemented by Petitioners was enacted. If Petitioners were to be successful in their attempt to overturn case law uniformly adopted by the Fourth, Sixth, and Eleventh Circuit Courts of Appeal, the educational decisions, policies, and procedures of the Shelby County School System would be determined by a board dominated by persons elected by an electorate, 75% of whom do not even reside within the area served by the Shelby County School System. Seventy-five percent of the electorate would reside in a geographical area populated by families with children who attend not Shelby County schools, but, rather, City of Memphis schools. This 75% of the electorate would be unlikely to drive to the other end of the county to attend a PTA meeting, or to make inquiry, or express concerns as to policies relating to educational criteria, discipline, standardized tests, *etc.*, relating to the education of children, not their own, residing in other geographical areas.

The Sixth Circuit in *Duncan v. Coffee County*, 69 F.3d 88 (6th Cir. 1995), and in this proceeding have said that these non-residents of the relevant geopolitical entity would,

nevertheless, have the right to vote if they were financially supporting the Shelby County School System, or if their numbers were not so great as to give them the opportunity to overwhelmingly control the outcome of the election of the Shelby County School Board. The uncontested facts derived from stipulation and affidavit establish that persons residing in the area served by the Shelby County School Board actually support, on a net flow basis, the Memphis City School System. These same uncontested facts likewise establish that by their sheer numbers, voters residing in the Memphis City School District would dominate the election of Shelby County School Board Members.

In addition to establishing the geopolitical entity known as the Shelby County School District, T.C.A. § 49-2-201(c) restricts membership on the Shelby County Board of Education to residents of the Shelby County School District. *If* a member of the Shelby County School Board was a "county officer" prior to 1992, this can certainly no longer be the case since the enactment of T.C.A. § 49-2-201(c). This subsection creates a position which can only be filled by one-fourth of the otherwise qualified citizens of Shelby County, Tennessee. Further, the duties of this position are to serve upon the Board of Education for the Shelby County School District, an area comprising only a portion of Shelby County. Petitioner cites no case authority for the proposition that this position which no longer entails county-wide responsibilities, is, or should be considered to be a "county" office as contemplated by the Tennessee Constitution.

In its Petition, Petitioners repeatedly suggest that the District Court and the Sixth Circuit Court of Appeals erred in failing to defer to Tennessee state law. In fact, allowing domination of the Shelby County School Board by representatives elected by "persons not served" and having "no substantial interest" in the operation of the Shelby County School System, would serve

to frustrate and undermine the explicit goals of the legislature and courts of the state of Tennessee to eliminate "relative indifference" and to provide for "local accountability" in the operation of the school systems located within the state of Tennessee.

CONCLUSION

Wherefore, Respondent Intervenor, Shelby County Board of Education, *et al.*, would suggest that Petitioner's Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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